THE JOURNAL
OF
POLITICAL ECONOMY

VOLUME 23 *June 1915* NUMBER 6

THE MERCHANT AND HIS LAW

Business law seems to have won a place in our new colleges of commerce—but what is business law? One may with equal propriety ask what are commercial organization and administration, business psychology, business economics, commercial French, German, Spanish, and even business English among the courses offered in colleges of commerce. Upon finding ethics in one of their announcements I have wondered why its presence was not excused by calling it business ethics. Of course, the business man is not entitled to a peculiar code of ethics. Neither is he any longer given a special code of laws in this country. Still it seems to be a mooted question whether ordinary law is adequate for business needs. Analogies drawn from the other "business" or "commercial" subjects may not be without point, even if they do no more than to direct our attention to horrible examples. Business German has been described as everyday German; the latest treatises describe business law in about the same way. Business psychology has been described as "buncombe," and business English as "an inferior course in English." One is reminded of the popular courses in medicine arranged in some schools for dentists, nurses, veterinarians, and pharmacists, the chief object of which seems to be not to make the student a physician. Not to multiply instances, let me quote the suggestive words of an enthusiastic Spanish teacher

who was asked to conduct a course in a college of commerce. "Commercial Spanish!" said he, "there is no such thing!"

The wide range of meaning that we shall find associated with the terms "commercial law," "business law," and "the law merchant" reminds us that every age is entitled to its own classification of law. Though we keep the nomenclatures of the past, like the Attic robber with the iron bed we cut and stretch the concepts to meet our own conditions. The "natural law" that is being revived by one school of philosophers today has little in common with the "law of nature" of the Renaissance: then, "Nature" in jurisprudence as well as in art suggested classical standards; today it means the result of contemporary scientific observation. "Divine law" as a branch of law meant one thing before the Reformation, and another thing thereafter; nobody knows what it does mean today in England, since it has been judicially defined as Parliament's pronouncement for England and something else for the rest of the world.[1] In this country the laws of God will be remembered by readers of Knickerbocker's *History* as those by which the early settlers of New England agreed to be guided until they could make better laws for themselves. Is it surprising, then, that *lex mercatoria* has many historical meanings? At first, when the common law itself was little more than a series of technical rules of evidence and procedure, it is probable that this term indicated merely a different set of similar rules, enforced in special courts, established to insure speedy justice for the foreign merchant.[2] The expediency of providing a quick, simple procedure for such persons was recognized by Bracton in the middle of the thirteenth century.[3] This, rather than the adoption of an imaginary code, is the purpose of the *Carta Mercatoria* (1303) of Edward I in promising certain foreign merchants speedy justice, *secundum legem*

[1] *Brook* v. *Brook*, 9 H.L. Cases 193 (1861); cf. the Deceased Wife's Sister Marriage act of 1907 and *Thompson* v. *Dibdin* (1912), A.C. 533.

[2] Pollock and Maitland, *History*, I, 450.

[3] For a collection of the best discussions of the history of commercial law see Vol. III of the Association of American Law Schools' *Select Essays in Anglo-American Legal History* (Boston, 1909). In referring to these essays the abbreviation *Sel. Es.* will be used instead of the original place of publication. For Bracton's view see *De Legibus Angliae*, *lib.* v, *fol.* 334*a*, and 444*a*.

mercatoriam. Of course, here, as in other departments, substantive law was soon precipitated in the meshes of adjective law. The process took place in all the countries of Europe simultaneously. In 1600, Sir John Davies, poet and lawyer, accordingly finds in the *lex mercatoria* a branch of the law of nations.[1] His contemporary, Gerard Malynes, a leading merchant, sees in it a natural system of justice, superior in every respect to local laws (1622). About this time the common-law courts succeed in crushing the mercantile courts, and the law merchant becomes nothing but a set of special customs, a troublesome set to Lord Holt (1689–1710). To Blackstone (1765) the law merchant was a branch of the law of England which decided the causes of merchants by the general rules which obtained in all commercial countries.[2] Lord Mansfield (1756–88), beginning at this point, ends by making it an integral part of the law of England. In America, the term has frequently been limited to the law of negotiable instruments, the field in which Mansfield's work was most successful, or loosely extended so as to include various branches of law of interest to the business man, for example, sales, bills and notes, shipping, insurance, and business associations. It is hardly surprising in a classification based solely on the law as it is today to find the law merchant given no more definite significance than the law of tailors would be given;[3] nor is it difficult to try and convict such heresy before the bewigged authorities of the past. If the writings of today are ever subjected to higher criticism in the future, what ages will be found gaping between parts of the following popular definition of commercial law:

> the body of law which relates to commerce, such as the law of shipping, bills of exchange, insurance, brokerage, etc. The body of rules constituting this law is, to a great extent, the same throughout the commercial world, the rules, treatises, and decisions of one country, with due allowance for local differences of commercial usage, being in general applicable to the questions arising in any other.[4]

There are vestiges here of many centuries.

[1] Zouch, *Jurisdiction of the Admiralty* (1686), p. 89.

[2] Blackstone, *Commentaries*, I, 273; IV, 67.

[3] Ewart on *Estoppel* quoted and criticized in Burdick's essay in 3 *Sel. Es.*, 34.

[4] *Century Dictionary;* cf. also brief article in *Enc. Brit.*, 11th ed., to the same effect.

Most of the efforts to train the merchant in Anglo-American commercial law, like the popular concept of what commercial law is, have lacked perspective. Running over about half a hundred books on the subject prepared for laymen, and such references to as many others, long forgotten, as are imbedded in the usual repositories for such information, one is struck with two facts: first, the almost ludicrous family resemblance of the authors, and second, the family antagonisms that seem to exist among them. It is amusing to see how consistently these writers ignore each other, each pretending to begin the work of compiling the law for business men as if it were a brand new idea. To bring the long-estranged members of this family together in a reunion, so to speak, with old Grandfather Malynes at the head, is the charitable object of this paper. A more selfish object is to exploit them and learn what we can of the scope and methods that they have developed in the legal education of the merchant from the days of apprenticeship to those of the college of commerce.

When England under Elizabeth was emerging from its rural state and entering upon its career as the greatest of commercial countries; when its citizens, emboldened by success on the sea, were taking over the functions of the mediaeval business men of Continental Europe, especially of Italy, and learning their habits and customs, Gerard Malynes was closely observing "traffick" at home and abroad. After fifty years of experience, in the course of which he was frequently consulted on mercantile affairs by the Privy Council, he wrote a book for the education of the merchant, *Consuetudo vel Lex Mercatoria* (1622). In this great work he bears testimony (at p. 308) that a merchant suitor in a merchant court was "*in loco proprio*, as the Fish in the water, where he understandeth himself by the custome of merchants." The merchant's knowledge could not have been gleaned from books, for this wide-awake author who seems to know something about the law books of the day assures us that "the customary law of Merchants hath never been written by any Civilian or Philosopher, nor for ought I know, of any author, as is convenient for Merchants." He is somewhat sarcastic about the lawyers' books on the subject, with their *apices juris*, "by the reading whereof merchants are like rather to

metamorphose their profession and become lawyers than truly to partaine to the particular knowledge of the said customes or law merchant." Consequently it seems that the young merchant of Elizabethan England learned his law or custom as part of his trade, just as any apprentice learned his craft or mistery. Did Shakespeare have such apprentices in mind when he made Launcelot Gobbo quibble with his "aforesaids" and repetitions and his callings on his father to specify?

What little we know of the law merchant as administered in pre-Elizabethan England bears out the suggestion that it was layman's law. Whenever the common-law judges needed information about it they had to turn to the merchants.[1] It was practiced in special courts presided over by laymen, especially the admiral's court, the staple courts, and the courts of the fairs. As admiralty and the staple had to do with foreign commerce, which was chiefly in the hands of foreign merchants living under some form of Roman law, we are particularly interested in the last of these, the so-called courts of piepowder, where the native law merchant was developed. The name probably signifies "peddlers' courts." They were the lowest and at the same time the most expeditious courts known to the law of England.[2] Though they go back beyond the period of legal memory and continue in England to the seventeenth century and in America to the Revolution, we know very little of their actual doings from hour to hour and from day to day. Their decisions were not recorded. Professor Maitland has lifted the curtain long enough for us to obtain a glimpse of the stage and catch a few lines from the actors.[3] Here are assembled merchants from Stamford, Nottingham, Leicester, Huntingdon, Godmanchester, Bury St. Edmunds, Wiggenhall, and Ypres, all come to the Fair of St. Ives in the year 1275. Here is the troublesome Richard, Butcher of Boston, who does not hesitate to carry off a ham from Henry, Chapman, or a fleece of wool from Simon, Chapman, without

[1] 2 Selden Society Publications, 132; Pollock and Maitland, *History*, I, 450.

[2] Blackstone, *Commentaries*, III, 32.

[3] 2 Selden Society Publications, 130–160: *The Fair of St. Ives*, 1275 and 1291, selections from a roll in the Public Record Office (Augmentation Office, Court Rolls, Portf. 16, No. 16). For other sources see Gross in *Quar. Jour. Econ.*, *infra*.

paying. Here is Thomas de Toraux who permits his servant to sell canvas by a false ell. Here are townfolk and country folk and all kinds of disreputable fair followers; they keep Elias the Hundredor busy. Their law is as simple as their lives. The God's-penny binds the bargain; the tally is evidence of a debt; he who cries "halves" when a butcher's bargain is made can claim his half after the manner of children playing a game; the drink seals a contract; merchants of one community are responsible for each other. Even the crimes are simple. Here we catch the original gold-brick bunco-steerer. "Indeed, sir, there are cozeners abroad." "Reginald Pickard of Stamford came and confessed through the middle of his mouth that he sold to Peter Redhood of Lonn' [can this mean 'of London'?] a ring of brass for $5\frac{1}{2}d.$, saying that the said ring was of purest gold, and that he and a one-eyed man found it on the last Sunday in the Church of St. Ives near the cross." Poor Peter Redhood! I find him before the court of this fair once more, this time inveigled into becoming the pledge of one who courted trouble by assaulting the litigious Thomas of Wells "with the vilest words calling him thief 'and other enormous things.'" It is somewhat surprising, in view of the efforts of the thirteenth century to exclude attorneys from manorial courts, to find them here: Richard of Toseland, Walter Bacon, Richard the Cellarer's pleader, Simon Blake, attorney and chapman (who, by the way, is no other than the servant who measured with the false ell and tried to cover his guilt by breaking the stick and hiding the pieces), and last but not least, the shyster, William Bolton, whose complaint seems to be that someone has prevented him from getting money from both sides of a case. Though the merchants themselves are the ultimate judges,[1] and the rules are simple, these attorneys are encouraged it seems by the technicality of this early law—primitive law is always likely to be technical. Thus the court decides that one man "did not defend the words of court which ought to be defended." Another, accused of taking ginger, zedoary, and other retail spices from his master's booth, defends *de verbo ad verbum*, "and he is at his law." Here the curtain drops. We can only imagine that the scene goes on at St. Ives, as we know it does at

[1] *Ibid.*, p. 130 and *pl.* 147.

Stourbridge Fair, at Winchester Fair, and at many other fairs, more fairs, in fact, than England finds herself able to support when improved roads give the people access to other kinds of markets. Bartholomew Fair, one of the oldest, and one of the longest to endure, evidently had its court of piepowder, presided over by some Justice Overdo in Ben Jonson's day. Shakespeare's rogue, Autolycus, "haunts wakes, fairs, and bear-batings." But while Shakespeare and Jonson are contemplating the humorous and poetic sides of the fair as a relic of the past, a new day is dawning for the merchant and his law. Coke, a man without humor and without poetry, follows on their heels.

In 1606 Sir Edward Coke was made chief justice of the Court of Common Pleas, and immediately began his attack on all special courts in which rules of law differing from the common law were administered. He almost annihilated the admiralty jurisdiction,[1] but this survived after a struggle,[2] so weakened, that it did not come into its own again for nearly two centuries.[3] He would have handled the Chancellor's court of equity as roughly as he handled the Chancellor, Sir Francis Bacon. But in 1616, when his arch-enemy was attorney-general, the law officers of James I declared chancery a court of ordinary justice for matters of equity and not within the scope of the Statute of *Praemunire*. Other courts not so strongly intrenched were bound to yield.[4] The staple courts expired in the seventeenth century.[5] The prestige of the court of piepowder dwindles for another hundred years until it is little more than a name of doubtful origin.[6] Its authority had been strictly limited by a decision of 1600,[7] and the next year witnesses the

[1] 1 *Sel. Es.* 314; 3 *ibid.* 9; cf. *Thomlinson's Case*, 12 Rep. 104 (1604); 2 Brownlow 16, 17 (1610).

[2] Winch 8 (1622).

[3] *Pepys' Diary* for March 17, 1662–63; *Sparks* v. *Martins*, 1 Ventr. 1 (1668). The jurisdiction of the High Court of Admiralty became important under Lord Stowell (1798–1828).

[4] *Came* v. *Moye*, 2 Sid. 121 (1658). Proceedings in Insurance Court *held* no bar to an action in a court of law.

[5] Burdick in 3 *Sel. Es.*, 43, citing Prynne: *Animadversions*, 175.

[6] Charles Gross, "The Court of Piepowder," *Quar. Jour. Econ.*, XX, 231.

[7] *Howel* v. *Johns*, Cro. Eliz. 773 (1600).

first recorded decision on the law merchant in the common-law courts.[1]

Before the judges of the common law the merchants were compelled to set out and prove their customs in each case as matters of fact not recognized as part of the law of the land nor dignified by judicial notice.[2] In these courts the merchants must have felt decidedly like fishes *out* of water. They had been accustomed to speedy justice. Coke, however faulty his etymology may be, pictures the court of piepowder as dispensing justice as quickly as dust falls from the foot.[3] In the ordinary courts of common law "the law's delay" had already won its place among the recognized ills of this life.[4] We have all heard how Hale laughed at the merchants' presumptions, and how Holt, opposing their innovations *totis viribus*, denounced the men of Lombard Street who from "obstinacy and opinionativeness" attempted to give laws to Westminster Hall.[5] What the merchants had to say about common law is equally interesting though not so generally known. Malynes, for example, is as good or as bad an etymologist as Coke: "In chancery every man is able by the light of nature to foresee the end of his cause, and to give himself a reason therefor, and is therefore termed a *cause;* whereas at the common law, the Clyent's matter is termed a case, according to the word *casus*, which is accidental; for the party doth hardly know a reason why it is by law adjudged with or against him."[6] John Marius, a "Publike Notary," whose *Advice concerning Bils of Exchange* (1651 and 1655) was "intended to be useful as well to the merchantman as to the notary and others," informs us quaintly that "the right-dealing merchant doth not care how little he hath to do in the common law or things of that nature."

The "obstinacy" of the merchants was effective, not only in winning Parliament to their side, but also in maintaining the position of the merchants as the final authorities on the law merchant

[1] *Martin* v. *Boure*, Cro. Jac. 6 (1602).

[2] *Oaste* v. *Taylor*, Cro. Jac. 306 (1612); *Woodward* v. *Rowe*, 2 Keb. 105 (1669).

[3] Coke, *Inst.*, iv, 272.

[4] *Hamlet* (1602), Act III, sc. i.

[5] *Clerke* v. *Martin*, 2 Ld. Raym. 757 (1703); *Buller* v. *Crips*, 6 Mod. 29 (1704).

[6] Malynes, *Lex Merc.*, Part III, chap. xvii. This preference for chancery is the more remarkable because it comes the year after Bacon's fall.

until Lord Mansfield's day. How did the merchants learn this law? Malynes, who had learned in the school of experience, advised merchants who would be wise in their profession, truly to peruse and ponder the contents of the book which he had compiled in his love to merchants. This work went through five editions in about half a century. Marius in the following generation, however, in "hanging a bush" for the wine in his book, still appeals to experience as his teacher and authority: "It is the crop of four and twenty yeares experience in my employment in the art of a Notary publike."[1] A half-dozen other works on sea laws, bookkeeping, and other matters of interest to the merchants of those days were published in company with Malynes' and Marius' works. They represent one way, but not the chief way, in which the English merchant of the 1600's got his learning. Hear Richard Dafforne of Northampton, accountant and teacher of accounts. In his *Merchant's Mirrour*, or *Directions for the Perfect Ordering and Keeping of His Accounts, framed after the (so-termed) Italian manner* (3d ed., 1660), he rather seems to boast of having got his learning in Amsterdam, and yet complains that English merchants send their sons to the Continent to learn the art of merchandising. "James Peele and others that have written in English upon this subject are known," he laments, "by name only and not by imitation. . . . . How, then, shall our youth attain unto this art but by frequenting abroad amongst other nations?" And then in a confidential tone, like Silas Wegg, he drops into poetry:

> They being then at Rome,
> Will do as there is done.

This was a period of turmoil and confusion in political life, of quarrelsome pamphlets in literature, perhaps of little achievement in education, but withal of constant expansion in English commerce. It was only a question of time until the common lawyers would turn their greedy eyes to the heretofore neglected prizes of commercial litigation. Unintentionally Malynes and his followers helped them, and their books did a "great deal to prepare the way for the change which took place in the next period under the auspices

[1] Preface, p. 2.

of Lord Mansfield."[1] This change meant not only the absorption of the law merchant in the common law, but also the ultimate surrender by the merchants of their standing as the final authorities on this law. Lord Mansfield, chief justice of the Court of King's Bench (1756–88), has justly been called the "Father of Modern Mercantile Law." We are told that "he reared a body of special jurors at Guildhall, who were generally returned on all commercial cases to be tried there. He was on terms of the most familiar intercourse with them, not only conversing freely with them in court, but inviting them to dine with him. From them he learned the usages of trade and in return he took great pains in explaining to them the principles of jurisprudence by which they were to be guided."[2]

In the meantime the position of business in the law of the land and therefore the education of the business man in law had taken a new turn. Toward the close of the seventeenth century, in spite of Chief Justice Holt's resistance, the law merchant had become practically a part of every man's law.[3] One could no longer plead as he could have in Malynes' day that a party to a transaction was a gentleman and not a trader. The force of circumstamces that so unceremoniously huddled gentlemen and traders into one class during this iconoclastic century is illustrated in the apology of the author of *The Mappe of Commerce* (1638) when he explains that he was compelled to become a merchant through "adverse *fortuna* or cross fate."[4] The very act of drawing a bill of exchange now made one a trader for that purpose.[5] The result was twofold: in the first place, it became necessary for all persons to know something of the law merchant, from which no one was exempt; and again, it became necessary for merchants, deprived of their own familiar

[1] Jenks, *History of English Law*, p. 75.

[2] Campbell, *Lives of the Lord Chief Justices*, II, 407, note.

[3] *Mogadara* v. *Holt*, Shower 318 (1690); *Bromwich* v. *Lloyd*, 2 Lut. 1582, 1585 (1699); Statute 3 and 4 Anne, c. 9 (1704).

[4] Lewis Roberts (1596–1640) joined the East India Company in 1617. He wrote *The Merchants Mappe of Commerce Wherein the Universal Manner and Matter of Trade Is Compendiously Handled* (London, 1638). This work is praised by Marius in his preface where (through a misprint) it is called *The Maso of Commerce.*

[5] *Witherley* v. *Sarsfield*, 1 Shower 127; *Sarsfield* v. *Witherby*, Carthew 82 (*ca.* 1686).

courts, to learn the common law of the king's courts. It was already generally recognized that the "laws of England do bind all men to knowledge" and that "no man may be ignorant of them."[1] The layman's popular law books cease to be expositions of the *lex mercatoria* and take on the tone of *Every Man His Own Lawyer.* In the transition stands Giles Jacob (1686–1744), poetaster, playwright, biographer, law reporter, and most diligent of compilers, celebrated in Pope's *Dunciad* (III, 149–50):

> Jacob, the Scourge of Grammar, mark with awe,
> Nor less revere him, Blunderbus of Law.

In 1718 he published a *Lex Mercatoria;* then he attempted to commonplace the common law (1726), and finally appeared anonymously his *Every Man His Own Lawyer.* Then follow dozens of books by other writers entitled "Every Man His Own Lawyer," or "Counsellor," or "Proctor," or even "Attorney" (whatever that may mean). Every man is also supplied by the publishers with legal "Assistants," and "Friends" and "Vademecums." Not content with general terms, the book-makers resort to specialization: we find not only Every MAN his own lawyer, but also Every Bankrupt, Every Country-Gentleman, Every Landlord and Tenant, and Every Debtor, whether Englishman, American, or Irishman—each admitted to the bar for his own purposes, according to the ideal, or hope, or promise held out to us by the compilers of the popular law literature of the eighteenth century.[2] I have never heard that

[1] Malynes, *Lex Merc.*, Part III, chap. xvii, cf. 1 Coke, *Inst.*, 177; *Manser's Case*, 2 Rep. 3*b* (1583). In 1 Hale, *P.C.*, 48 (written before 1676, published 1736), we read: "Every person of the age of discretion and *compos mentis* is bound to know the law and presumed to do so."

[2] The following is a representative list: 1714, William Cecil's *Every Bankrupt His Own Lawyer;* 1717, Jacob's *Country Gentleman's Vademecum;* 1720, *Gentleman's Assistant, Tradesman's Lawyer and Countryman's Friend;* 1750, Wyndham Beawes' *Lex Mercatoria Rediviva;* 1755, *Everyman His Own Lawyer* (for Ireland); 1768, Hugh Gaine's *Everyman His Own Lawyer, or a Summary of the Laws of England* (New York); 1771, *The Merchant's Lawyer;* 1774, *The Farmer's Lawyer, or Every Country Gentleman His Own Counsellor;* 1775, *Every Landlord and Tenant His Own Lawyer* (a second edition); 1777, Hamilton's *Introduction to Merchandise,* [with] *Laws;* 1786, *Every Man His Own Proctor;* 1794, Howard's *Every Tradesman His Own Lawyer;* 1795, Marriot's *Country Gentleman's Lawyer and Farmer's Complete Library;* 1800, Neale's *The Prisoner's Guide, Every Debtor His Own Lawyer.* See also *infra*, n. 3, p. 547.

lawyers have suffered as a result of the multiplication of these books. On the contrary, we have evidence of the mischief in them from the very beginning. I have before me the case of *Lansdowne* v. *Lansdowne*, decided by Lord Chancellor King on June 15, 1730. In this case one Hughes finds himself in trouble and in court for having misguided one of the parties. "Hughes, in his answer, admitted that he had given his opinion that William was the heir at law of Thomas, 'being,' as he said, 'misled herein by a book which this defendant then had with him, called *The Clerk's Remembrancer*.'" It is amusing to think that this is reported in Jacob and Walker's Reports (Vol. II, p. 205) and that our old acquaintance is therefore recording a joke on himself. Jacob compiled *The Clerk's Remembrancer!*

The century of the popularization of legal lore witnessed the enactment of a statute providing that Latin give way to English in court proceedings and that "the unintelligible court-hand be abolished."[1] It also witnessed the introduction of English law into the universities. France had begun to teach French law in French in 1679. Germany had followed this example for its own law in 1709. In 1758 Blackstone began his course of lectures at Oxford. His *Commentaries*, published as a result, in 1765–69, represent the culmination of the movement to popularize the law. According to his bitterest opponent, Bentham, it was he who "first taught jurisprudence to speak the language of the scholar and the gentleman." His immediate success is attested by the fact that in the American colonies alone no less than twenty-five hundred copies of the *Commentaries* were absorbed prior to the American Revolution.[2] The words of Edmund Burke in his famous oration on the American colonies will be recalled:

> In no country perhaps in the world is the law so general a study. The profession itself is numerous and powerful; and in most provinces it takes the lead. . . . . But all who read—and most do read—endeavor to obtain some smattering of that science. I have been told by an eminent bookseller, that in no branch of his business, after tracts of popular devotion, were so many books as those on the law exported to the plantations. The colonists have now

[1] St. 4 Geo. II. c. 26 (1731).

[2] Thayer, in *Legal Essays* (Boston, 1908), p. 366, quoting Hammond's Blackstone, IX. See also Maitland in 1 *Sel. Es.* 204.

fallen into the way of printing them for their own use. I hear that they have sold nearly as many of Blackstone's "Commentaries" in America as in England. General Gage . . . . states that all the people in his government are lawyers or smatterers in law.

We must, of course, make full allowance for the exaggerations of General Gage and for those abnormal conditions in America on the eve of the Revolution, that made English law a useful and therefore a popular weapon in the hands of the colonists. As Professor Reinsch has shown, after a period of indifference or rather of opposition to the common law, "the struggles with the mother country caused a wide spread of legal knowledge and the common law came to be revered as a muniment of personal liberties. Blackstone was outdone by American lawyers in extravagant panegyrics."[1] The generation that followed the Revolution was hardly so friendly to law and lawyers. Still there must be some further explanation of the changes in the following period that resulted in comparative ignorance on the part of the layman of the law under which he was living and working. At least three factors contributed to this result. In the first place, the rapid development of industry in the American commonwealths after the Revolution soon made the life and law of the people more complex than they had been when Blackstone wrote. It must be remembered that Mansfield's work was scarcely begun when the lectures were delivered at Oxford, and not half finished when the United States became independent. There was a tendency not to follow English post-revolutionary decisions; at least two of the new states, Pennsylvania and Kentucky,[2] went so far as to enact statutes of non-citation. Jefferson advocated a similar law for the United States.[3] Even the pre-revolutionary English law was considered the law of the new states only so far as "applicable to their condition."[4] In short, the law of the day was growing complicated, and constantly becoming less available to the lay reader. A second factor contributing to the

[1] Reinsch, in 1 *Sel. Es.*, 367.

[2] See *Turnpike Co.* v. *Rutter*, 4 Serg. and R. 6 (1818); Morehead and Brown, Statutes, 613 (1807); *Hickman* v. *Boffman*, Hardin's Rep. 348, 356, 364; *Gallatin* v. *Bradford*, *ibid.*, 365, note (1808).

[3] In a letter to Cutting, dated Paris, October 2, 1788.

[4] *Van Ness* v. *Pacard*, 2 Peters 144 (1829).

layman's ignorance of law was the development of specialization in modern life, which required of no man a technical knowledge of subjects beyond his own sphere. Finally, we must remember that hundreds of departments of reading and recreation were gradually being thrown open to the educated man to dispute with law that portion of his attention which it had formerly shared only with Holy Scriptures and a few literary classics. Adam Smith (1776), Malthus (1798), and Ricardo (1817), for example, opened a door far more inviting to the business man than either the law that was growing unintelligible or Bentham's attacks on it which were growing more unintelligible. Whatever the reasons, this much is clear: the early nineteenth century did not witness the development of lay education in business law, either as a distinct branch so well known to merchants in the seventeenth century, or as a popular restatement of the entire subject-matter of the law so familiar in the eighteenth century.

The nineteenth century is, however, extremely important in the history of business law. Though not generally discussed as a separate period in the books, it represents the internal victory of an apparently subdued *lex mercatoria*. Conquered Athens with her charms enslaves her Roman captors. One after another of the old legal relations, whether originally feudal, domestic, religious, or purely formal, is commercialized. Take for example the relation of landlord and tenant; the very words stand as a monument to its feudal origin. From a relation that once determined a man's social and political standing, a relation that assigned to him a court within which to seek protection for his rights, a relation that shaped his obligations of patriotism and loyalty, it has degenerated or developed into a purely contractual relation, differing from the most ordinary commercial relations only in one or two anomalous particulars.[1] Or let us take what seems more clearly a business relation—that of principal and agent. In its origin this relation is indistinguishable from that of master and servant, still classed in the law books as a domestic relation.[2] The business man will ask, "Why a *domestic* relation?" Is it because the lawyers

[1] Thus, a tenant may not question his landlord's title.

[2] Holmes, in 3 *Sel. Es.*, 368.

merely choose to ignore (or are they ignorant of) the tremendous changes known as the Industrial Revolution that have substituted for the master and servant of the domestic system of production the employer and employee of the factory system? Even the fundamental contractual relation has not escaped a long process of commercialization the completion of which was witnessed by the nineteenth century. We are prone to forget that our conceptions of a contract come to us from many distinct sources, that seem to us radically different from contracts—torts, grants, formal obligations. The bringing of all these under the modern business concept of the "valuable consideration" is a very modern generalization indeed.[1] If we go back far enough, in order to make the contrast clear, we shall probably find grants, covenants, and parol agreements based on notions truly mediaeval. When King Wihtred (700–715 A.D.) and King Cnut (1033) wished to confirm charters, because of their ignorance of letters they made "the sign of the holy cross."[2] How many illiterates in making the sign today suspect the ancient and honorable lineage of the custom? Even private citizens in those days used to sanction their grants by reference to excommunication and eternal punishment.[3] A quasi-religious bond in early contracts in the *lex mercatoria* is suggested by the prototype of modern earnest money, the God's-penny, which was supposed to be used by the recipient for a religious purpose, and therefore to bind the consciences of the parties.[4] The tally was probably of a similar origin. These survivals are studies for the folk-lorist rather than the lawyer. The manner in which they

[1] The leading essays on the subject are collected in 3 *Sel. Es.*, 259 ff. Professor Ames and Judge Hare simultaneously discovered one source of the modern parol contract with its "valuable consideration" in the tort action on the case for deceit. Judge Holmes finds another source in the *quid pro quo* of the old action of debt (by which contracts of sale and loan were enforced on the theory of a double grant). The history of covenant leads us into less explored territory (cf. Jenks, *History*, p. 134). The fusing of these elements into the contract of the nineteenth century based in every case on the "valuable consideration" is in harmony with, if not induced by, commercial theories and practice.

[2] Digby, *History of Real Property*, 4th ed., pp. 57–60.

[3] *Ibid.*, p. 57, n. 3, quoting Kemble, *Cod. Dipl.*, I, lxv, as to grants of private individuals.

[4] 2 Selden Society Publications, 133; Pollock and Maitland, *History*, II, 206.

endured and lost their meaning is not recorded in the reports; and it is not so easy as was once supposed to bridge the chasm between the sacramental contract of old and the commercial contract of today by suggesting that ecclesiastical courts were imitated by chancellors in dealing with *fidei laesio*, and they in turn by the law courts. But when we consider the relations between the history of civilization and the history of legal ideas, it is clear that the non-commercial sacramental ideal of the contractual obligation, the formal ideal of the sealed instrument, or of the *quid pro quo* in the old action of debt, and the tort element in the old action of *assumpsit*, would be as inadequate today as the "valuable consideration" in its modern commercial sense would have been inapplicable in feudal society.

Commerce now draws upon the material of all the old non-commercial portions of the law and makes them its own. Take the case of the rival grammar schools in the Year Books (2 Henry IV, *fo.* 18, p. 6, *anno* 1400). The monks of the priory of Lantone had conducted a school in Gloucestershire from a time before which the memory of man did not run. A new master ventured to set up another school, "by which, whereas the plaintiffs had previously been accustomed to get 40*d.* for each child, they could now get only 12*d. ad damnum etc.*" Hankford J. observed that *damnum*, actual damage, may exist without *injuria*, a wrong in the legal sense. No relief was given to the monks. Far be it from me to suggest that these pious monks soiled their hands with commerce. On the contrary, I agree with their learned counsel that education is a spiritual matter. And yet their case has been very neatly cited in solving nineteenth-century and even twentieth-century business problems in fair and unfair competition. Would Holt have said that monks who take money for running a school become *ad hoc* traders? Or shall we say that the commercial framework of modern society has taken the place of the feudal framework of the Middle Ages?[1]

[1] Professor Bigelow in his *Centralization and the Law* remarks at p. 6: "The dominant force, if it maintains itself long enough, always imposes its tenets, modified somewhat by the contest itself, upon society." And in a footnote he comments: "Law merchant affords striking illustrations."

Business has for some time been the growing point of the law. It may be slowly yielding its place to sociological interests. But whether we turn to constitutional law or criminal or administrative law on the public side, or to property, contracts, or torts on the private side, thousands of the statutes and decisions that are being ground out touch commercial life at every turn. The "interstate commerce clause" is one of the most active clauses in the Constitution today. The new crimes have to do with deception in business rather than with violence. Public business is being modeled after private business. Our statutes are concerned with employer and employee, with the regulation of big business, and of special businesses in which the interests of the public are vitally concerned, such as transportation and insurance. The cambial layer of torts is filled with the interference with contract rights, unfair competition, trade-marks, and fraud. Our courts are kept busy with questions growing out of business contracts.

With business in constant contact with law and lawyers, business men have as a matter of course been receiving much practical training in law—very much in the same way as criminals learn criminal law. Lawyers soon learn to respect the opinions of business men as to the law in their particular fields. Sometimes the difficulty of injecting law into business men is offset by the facility with which we project lawyers into business through corporate organization. Very little of the ordinary business man's legal training, however, is to be credited to books. A survey of the writings on commercial law since 1800 reveals three classes of works that have appeared in the following order: books primarily for lawyers, reconstructing a mercantile law out of the fused materials of the common law; books intended as manuals for business men; school books. It is interesting that the first group is found in the first half of the nineteenth century, the second group in the second half, and the third group in the present century. Of course as in all similar historical developments we must expect important overlappings.

Of the first class, passing over the early efforts, we must pause in wonder at the vast works of Judge Story. The titles give a very good idea of the scope of commercial law in his day: *Bailments*,

1832; *Agency as a Branch of Commercial and Maritime Jurisprudence*, 1839; *Partnership as a Branch of Commercial and Maritime Jurisprudence*, 1841; *Bills of Exchange*, 1843; and *Promissory Notes*, 1845. In England, John William Smith (compiler of Smith's *Leading Cases*) wrote his well-condensed *Compendium of Mercantile Law* in 1834. But when the American editors of this work made their necessarily minute comparison of mercantile law in the two English-speaking countries, they concluded: "that in the department of Mercantile Law, we are in advance of our transatlantic brethren." It is not surprising that Story was accepted during his lifetime as an authority in England contrary to all precedents.[1]

One of Story's successors in the Dane professorship in the Harvard Law School, Theophilus Parsons, marks the transition from the first to the second class of books. He tells us that his first books on commercial law, made exclusively for lawyers, were read by many persons who were not lawyers in the middle of the century. In his first work for business men exclusively he expresses the belief "that there is a strong and growing disposition among the men of business in this country to understand the law of business. This disposition and the actual diffusion of this knowledge have both greatly increased of late years, and [he believes] could not have been arrested, for this progress is one element of advancing and improving civilization."[2] Professor Parsons argues that it is possible to teach the people the law without leading "only to a superficial and erroneous view of the subject, ... the most dangerous kind of ignorance." The arguments of those who "most strenuously oppose any effort to teach the people the law" are not in

[1] A short colloquy reported in *Ion's Case*, 2 Den. C.C. 475, 488, is reprinted by the late Professor Gray, in his *Nature and Sources of the Law*, sec. 567:

"*Metcalfe* [referring to Welsby's edition of Archbold's *Criminal Pleading*]—Mr. Welsby, who may be cited as authority, comments on the words 'utter' or 'publish.'

"POLLOCK, C. B.—Not yet an authority.

"*Metcalfe*—It is no doubt true that a writer on law is not to be considered an authority in his lifetime. The only exception to the rule, perhaps, is the case of Justice Story.

"COLERIDGE, J.—Story is dead." [1851.]

The reporter in a note adds the names of a few writers who seem to share the honor with Story.

[2] Theophilus Parsons, *Laws of Business*, 1857, 1869, etc.

Parsons' day entirely supposititious. In the graduation address of Dean Bellamy Storer of the Cincinnati Law School in 1864 the young lawyers were told that if they ever heard a man in a book-store ask for an every-man-his-own-lawyer book, they could not do better than to cultivate his acquaintance.[1] In this connection it is interesting to read in an early publisher's announcement, where Parsons' book is completely surrounded by theological and missionary works, that this work "essentially enables every man to be his own ready lawyer."[2] Still there is a vast difference between the imitators of Parsons—and their name is Legion—and the earlier popularizers of the law.[3] The scope of these newer books is "all that branch of the law, and all those principles and rules, which govern mercantile transactions of any kind." No two writers are entirely agreed upon the details, and yet the likenesses are more remarkable than the differences. All include contracts and sales of personal property, negotiable instruments, agency and partner-

[1] I am indebted for this account to my venerable colleague, Judge Moses F. Wilson, a member of that class.

[2] Appended to the second edition of Parsons, *Laws of Business*, impressions of 1874.

[3] The writers on Anglo-American business law for laymen before Parsons include: 1800–1801, Montifiore (American ed.); 1800, Freeman (American ed.); 1902 [Caines]; 1812, John Williams; 1812, T. E. Williams; 1818, Gilleland; 1818, T. Williams; 1819, T. W. Williams; 1831, Hancock; 1833, Oliver; 1842, [Potter]; 1845[?], Wooler; 1849, Wells ("improved edition"); 1850–52 (American ed., 1854), Levi; n.d., Serle; n.d., M'Dougal.

Those following Parsons in the latter half of the nineteenth century include, in America: 1857, Freedly; 1860, Bateman; 1864, Matthews; 1869, Fox; 1870, Gazzam; cop. 1881 and 1888–1907, Putzel and Bahr; cop. 1889, Payne; 1889, Mihills; 1890, A. J. Hirschl; 1892 ("revised"), Weed; 1892 (ed. Clinton), Bryant; *ca.* 1896, Heidner and Heidner; 1896, Bolles; 1898, Spencer (Manual); n.d., Bledsoe, A. B. Bryant and Stratton, J. C. Bryant, Clark, Crosby, Douglas and Minton, Gano and Williams, Hargis (two books), Hill, Lyons, Mull, Musick, Parkinson, Richardson, Tenney, Townsend, Tracy, Williams and Rogers and a few anonymous works. British works in this period include: 1860, Fonblanque; 1881, Campbell; 1881, Lewis; 1884, Slater (frequently reprinted); 1890, Stevens; 1891, Hurst and Cecil; 1891, Scrutton; 1893, Munro; 1897, Fleming; 1899, Luscombe.

In addition mention should perhaps be made of several classes of reference works prepared for business men: brief tables of laws in rating agency books and the like; formbooks; brief encyclopedic works, e.g., Spalding (1903); Professor Bays, *Commercial Law Library* (1912), and *Modern American Law* (prepared primarily for law students). These works are really adaptations of the handbooks of the nineteenth century.

ship, the carriage of goods and passengers, insurance, and something about real estate. Some include patents and copyright, mortgages, administration of estates, and the later books, of course, add corporations. Most of the books of this period are manuals and form-books combined rather than textbooks. The evolution of Parsons' book is very instructive. For a good many years he had devoted his leisure, while teaching law, to the preparation of a series of text-books on commercial law. He first attempted to write a book that would serve both lawyers and laymen, but before he had made much progress in it "the hope that ONE book could answer these two purposes faded away." We are reminded of old Gerard Malynes' comment on the lawyers' books.[1] Still Parsons' first edition was compiled entirely from books written for the legal profession. Later, recognizing this feature as a fault, he undertook to eliminate or explain technicalities, to omit citation of authorities, and to add forms and elementary rules supposedly unnecessary in a book intended for lawyers. The difference between the business-law books and the lawyers' books continues to grow wider and wider along practically the same lines, until the constantly repeated statement of the former that they are not intended to train lawyers seems quite superfluous. Indeed, we suspect that some of them have been made expressly for that business man for whom all the musical comedies are written, the Tired Business Man.

The third class of books on commercial law, the school books, are practically a product of the twentieth century. Of course we must not overlook the commercial courses and particularly the commercial law courses that have been offered in our colleges in the past. Most of the early professorships in law were instituted to train professional lawyers and have long since developed into law departments.[2] Still, a good many of the schools, especially toward the close of the nineteenth century, included commercial law in their non-professional curricula. In the *Report on Legal Education* prepared by a committee of the American Bar Association and the

[1] Malynes, *Lex Merc.*, Part I, chap. 1.

[2] E.g., in William and Mary College (1779); Pennsylvania (1790); Harvard (1815). See Thayer, *Legal Essays*, p. 369, and Warren, *History of the American Bar*, pp. 341–65.

United States Bureau of Education in 1892, there is included (at p. 63) a list of colleges offering instruction in law in "college and commercial courses." Of these, over a hundred offered courses in commercial law or an equivalent. The same report tells us that "specific legal instruction is not offered in the public schools" except in the courses of study in civics or civil government. Since the appearance of this report, a few cities have introduced commercial high-school courses, including nominally the study of commercial law.[1] "Business colleges," too, have been giving elementary courses on the subject. It is difficult to draw any general conclusions as to the value of all of these courses. In many cases they were taught by men without legal training, frequently by the overworked president of a small college whose duties included lecturing to the Senior class on theology or some related or unrelated subject as well as on law. Their lack of uniformity is suggested by the rule of one college excluding prospective law students from these courses and the plan of another to make them serve as an introduction to the law-school course. If we try to judge the courses by the textbooks that they have left behind them, we find very little encouragement before 1900.[2] Since that time each year has produced several good summaries for class use. In 1905 the late Dean Huffcut of the College of Law of Cornell University produced the best-known of these works, a book that literally states, "as concisely and clearly as possible, the leading and fundamental principles of business law." In this book, which seems to have won its way into the majority of schools and colleges, because it so admirably met their needs, it is somewhat disconcerting to find their needs reflected in these words: "Should the teacher be fortunate enough to secure the co-operation of a local attorney, some progress in this direction [as to statutory matter] might be made."[3] It seems a

[1] W. A. Sheaffer, "The Teaching of Commercial Law in the High School," *Proceedings of the Nineteenth Annual Convention of the National Commercial Teachers' Federation*, held at Chicago, December 29–31, 1913, pp. 125–30.

[2] Among the nineteenth-century books but few pretend to be prepared for classroom use. Weed (1892) is one of the few exceptions.

[3] Huffcut was not alone in recognizing the nature of this need. Thus, the book mentioned in the last note says: "Teachers who have not studied law will find Parsons' *Laws of Business* an excellent reference book."

pity that the rule which requires practitioners to be able to pass an examination should not apply to teachers, whose powers for evil are perhaps even greater. Huffcut summarizes the views as to the scope of "business law" (since 1900 this term has almost entirely displaced the older "commercial law" as that had routed "mercantile law" and the "law merchant") in this frank statement: "Business law is . . . . merely such a selection from the general body of the law, and especially the law of contract, as a particular author may think it profitable for a business man to know." Most of the other books of this period differ from Huffcut only in details,[1] particular authors thinking it profitable apparently to limit the business man's knowledge to the laws of one state, or certain businesses, or certain relations in a business, or of business in some special sense. Somewhat in advance of the actual practice in the schools, in 1894 Huffcut and Woodruff in their case book on contracts announced that their work was intended, not only for classes in a professional law school, but also for undergraduate classes in a university. "It is an additional proof," say the editors, "of the value of law as a culture study, as well as a professional study, that the editors have encountered no difficulty in uniting in a selection of cases equally suited to both purposes." The book is not represented as fitted to the needs of business students, but a selection of cases based on this selection—Pierson and Callender's—is described as arranged "for the use of students of business law" (1911). We now have Professor Bays's *Cases on Commercial Law* fresh from the press (1914). It is rather remarkable that more case books have not appeared for the use of business students among the flying squadron of thin books on commercial law that has greeted us in

[1] The American books from 1900 to date include, besides many revisions of older works, the following: cop. 1900, White; 1900, Spencer (*Elements*); 1901, Austin and Smith (Ohio); 1902, Burdick (*Essentials of Business Law*, a really learned work, and yet simple enough for high-school use); 1905, Huffcut; 1907, Hamilton; 1908, Chamberlain; 1908, Brennan; 1909, Sullivan; 1909, Putney; 1910, Griswold; 1911, S. D. Hirschl; 1911, Pierson and Callender (cases); 1912, Gerstenberg and Hughes; 1914, Corlis; 1914, Bays (cases). Among British works of this period are: 1900, Edwards; 1902, Wilson; 1907, Nixon and Holland; 1907, Tillyard; 1908, Disney; 1909, Aske; 1909, Crew; 1909, Douglas; 1909, Thatcher; 1910, Duckworth; 1910, Farleigh; 1910, Russel.

the last few years. The reason is, no doubt, that the teachers of commercial law have not kept pace with the wonderful development in method in the law schools during the past generation.[1] Since, however, education for business is now for the first time in history being seriously worked out in college courses, and colleges of commerce have undertaken to teach business law as one of their main tasks,[2] we have reached a point where the entire material of commercial law must be re-worked, its scope redefined, and its methods brought down to date. This latest development is but a phase of development of business training. That in turn is but a detail of a bigger movement—the substitution of scientific specialized preparation for life's activities for the theory of general training of an earlier period, which scorned practical standards of everyday life. Business is raised to the level of a science, and with it business law.

Ever since Professor Parsons made a book for business men with pastepot and shears out of his lawyers' books, we have seen how the scope of business law has been a more or less limited selection from professional law. A few books have inserted a paragraph or two on business in general, after the fashion of the famous essay on Chinese metaphysics made up from the two encyclopedia articles on China and metaphysics respectively. The legal portion usually but thinly veils the Abbott outline of our digests and encyclopedias of law.[3] If a Hibernicism may be pardoned, the only thing they add to a law school course is extensive omissions.

[1] This negative conclusion is borne out, I believe, by the questionnaire sent out by Mr. Herman Oliphant, of the University of Chicago, to teachers of commercial law throughout the country in November, 1914. Mr. Oliphant's results have not yet been published.

[2] Cf. the *Report of the Educational Committee of the American Association of Public Accountants, Giving Information on the Department of Commerce, Accounts, and Finance of One Hundred of the Leading Universities in the United States*, September 2, 1912, p. 16.

[3] Abbott, *United States Digest* (1842), has furnished the basis for the *American Digest* (including the *Century* and the *Decennial* digests, the Key Number Series and Continuations) and for "Cyc." See statement of Mr. Schenk, Librarian of the University of Chicago Law Library, in 6 *Law Library Journal*, p. 37, January, 1914.

Is it not possible, however, that something may belong in the business-law course that is not generally included in law-school courses?[1] Is the entire problem one of elimination?

The law school does not aim to prepare a man for business, in spite of the alluring advertisements of some of the night schools and correspondence schools that would have us believe that even if their courses cannot lead to success at the bar they furnish a royal road to business success. As a matter of fact, the ordinary law course—and for that matter the practice of law—tends to give one about as good an idea of normal business life as the driver of a moving van is likely to get of an elegant home. Lawyer and moving man seem to have excellent opportunities of observation, experience in taking apart and putting together again under conditions requiring the greatest care—but unfortunately both men see their subjects under abnormal conditions. They know more of the turmoils and confusions of life than of life itself. Like the prisoners in the Marshalsea, lawyers are likely to "come to regard insolvency as the normal state of mankind, and the payment of debts as a disease" that occasionally breaks out. A business man may go through half a century of buying and selling, and if he is a very good or a very lucky business man, he may not be involved in a single case in court. If his business is well established he may have little need for a lawyer, but he necessarily has much need for law, and acquires a great knowledge of law in the course of his lifetime. He becomes an expert in legal hygiene.[2] If he is a far-seeing business man, he will understand the legal structure or anatomy of his business. Lawyer and law student are concerned with legal pathology. Thus, the juristic acts that *constitute* the making of a

[1] The American law-school curriculum is in a transition stage. It seems that the question of curriculum was uppermost at the last session of the Association of American Law Schools. Harvard is taking steps toward co-ordinating the first-year courses as explained in Dean Thayer's report for the year 1913–14. The present curriculum of most of the schools is a patchwork, which like the law itself can more easily be explained in the light of history than in the light of logic. Professor Bigelow advocates the addition to the law-school curriculum of some of the matters discussed below (*op. cit.*, p. 16), but whether or not they are part of the business education of lawyers, they clearly belong to the legal education of business men.

[2] A. J. Hirschl called his book (1890) *Legal Hygiene*.

contract are clearly within the business man's province. The pathological and therapeutical study of what to do where the juristic acts are imperfect is beyond his ken. He ought to be able to tell that something is amiss, whenever one of the expected elements is absent. Rectification is the work of the specialist in abnormal law. The college of commerce teaches law, not to make every man his own lawyer, but because without it a man cannot become a "compleat merchaunt" as Malynes would say.[1]

In presenting business law as a branch of business rather than of law—and that is the meaning of the inclusion of such courses in commerce departments and their absence in law departments of our great universities—we intuitively recognize the new meaning that history has put into the term " business law." It is not a branch of law at all, but the application of the ordinary rules of law to business activity. Still, as we have seen, popular jurisprudence disregards the changes that history has wrought and clings to the notion of an international *lex mercatoria* distinct in content and perhaps in principle from the common law. This popular jurisprudence with its basis in history and in remnants of fact finds an echo in the scientific jurisprudence of the day. "In the nature of things," says a recent writer in the *Harvard Law Review*,[2] "different rules are applicable to business than to the more formal, fixed, and personal relations of society, such as estates in land, succession, and domestic relations." He represents the assimilation of business law in the common law as a misfortune in England and America, and urges courts and legislatures by a rational and courageous extension of the application of the older theories of business in law to help solve the problems of modern trade. Thus he thinks that business being impersonal, the business man should have no right to refuse to deal with members of the public. The distinction made today

[1] It is interesting at this time to recall Malynes' view of the complete merchant's education. His plan curiously resembles the announcement of a modern college of commerce. Among other things, he prescribes arithmetic, commercial geography, the "three essentials of traffick, being commodities, money and exchange for money by bills of exchange," customs of barter and sale, credit, shipping, insurance, merchants' "accompts," and commercial law.

[2] Edward A. Adler, *Business Jurisprudence*, in 28 *Harvard Law Review*, 135, (December, 1914).

between public callings in which the principle of non-discrimination has long been recognized, and private callings in which freedom of contract is recognized, he rejects absolutely as unsound. "Under a true interpretation of the common law," he tells us, "all business is public, and the phrase 'private business' is a contradiction in terms."[1] Without making too extensive an excursion into the realm of hypothetics—the study of what might have been; without attempting to show that if Lord Mansfield had not found commercial law in a low state, the common-law principle of freedom of contract might have permeated business in the end, it is enough to say that the private nature of private business is established in our law. There was no doubt a good or a bad old time when you could have undone the common tailor for refusing to serve you,[2] or

[1] The argument by which all business is made to appear public in its nature is not convincing. It is true that in many phrases the word "common" was used in a sense suggesting the word "business." It is also true that the word "common" was used at times in the sense of "public." Mr. Adler argues that public and business are therefore coextensive terms. The use of the word "common" is illustrated by calling in the common merchant, the common marshal, the common schoolmaster, the common surgeon, the common shaver, the common bellman, the common maker and vender, the common hoyman, the common kidder, and a host of others. "Common" here means habitual, regular, doing a thing frequently or "commonly" and in that sense "making a business" of a practice. But on the next page we meet with the common scold, the common harlot, and the common thief. We should expect to find in their company the common railer and brawler. As if to shield us from their contamination we find the common prayer book. "Business" can hardly be substituted here, though "regular" or "habitual" can. In this early sense of the word the opposite of a common carrier is not a private carrier but a special carrier, that is, one who carries goods on a particular occasion. That the word was also used in the sense of "public" cannot be doubted, and that arguments were drawn from the name given in an earlier stage to prove the public nature of the carrier's calling is quite clear. This process is known as folk-etymology. It may be interesting in this connection to see how this very phrase has undergone a second transformation, that has made it seem to reflect modern theories of the function of the state undreamed of by those who coined the phrase in mediaeval England. An Ohio judge (Ranney in *Gilsy* v. *Railroad Company*, 4 Ohio State at 324), attempting to justify and explain the exercise of the right of eminent domain on behalf of a public service corporation, has drawn his argument from the notion that a *common* carrier is one giving a service not merely to the public, but due by its nature from the public. If it follows that because courts have used "common" in two senses, business is legally a service due to the public, one might as well argue that since the word now suggests a service due from the public, business is legally a state function. The fallacy is practically the undistributed middle term.

[2] Y.B. 22 Edw. IV, *fo.* 49, *pl.* 15 (1482).

the common smith for refusing to shoe your horse as you came riding along the highway,[1] but that state of the law has disappeared with the mediaeval doctrine of *justum pretium*[2] and the notions that inspired the Statute of Labourers[3]—and probably for the same reasons. We no longer recognize the old public policy that bade the shoemaker stick to his last.[4] In fact all of the class distinction necessary to maintain a separate law for traders has disappeared from the law. The plea that one was a gentleman and not a trader was probably an anachronism in the eyes of the people a generation before the reactionary Holt rejected it from the bench. Man-to-man commercial relations have gradually, as we have seen, been substituted for the one-sided feudal and domestic relations of the older law. Finally, whatever the condition may be in Continental Europe and Japan, it is practically impossible to isolate branches of human activity in the courts of common law in the face of their system of case citation. It is true that a code may establish a separate rule for every class of transactions, and may even make its own classes for the purposes of the rule. In Continental Europe the rule may remain distinct; but here the ancient habit of the common law soon levels the statutory upheaval by applying the principle of an ancient grammar-school case to a modern dispute among manufacturers of cash registers. If we cannot in practice permanently separate commercial law from other law on the basis of parties, of subject-matter, or of principles, what becomes of the theory that "there is a difference naturally and legally between business on the one hand and the other activities and interests of life on the other"?

All human activity in civilized society has its legal aspects; business activity is no exception. When the business man realizes

[1] Keilw. 50, p. 4 (1502); Y.B. 21 Henry VI, *fo.* 55, *pl.* 12 (1442).

[2] Cf. the attempts to fix the prices of cattle, poultry, and eggs in 1315 under Edward II, *De Pretio Victualium*, translated in Somer's *Tracts*, I, 6, and reprinted in Colby, *Sources of English History*, p. 92.

[3] 25 Edw. III, St. I (1351), continued from time to time until the Statute of Apprentices (5 Eliz. c. 4, 1562, repealed in 1814).

[4] Cf. *Ipswich Tailors' Case*, 11 Coke 53*a* (1614); Anon., F. Moore, 242; *Dutton* v. *Poole*, 2 Lev. 210; *Dyer's Case*, Y.B. 2 Henry V, p. 5, *pl.* 26 (1414).

that a contract is not necessarily a yellow parchment with a blue ribbon and red seal, or a legal-cap folder with much redundant and unintelligible language partly written and partly printed; when he sees perfect contracts in the purchase of a postage stamp, the sending away of an express package or a telegram, in the buying of a railroad ticket or the boarding of a street car, in every sale, in every loan, in the hiring of help; when after the manner of Monsieur Jourdain, the would-be gentleman in the French play, he realizes that he has been making contracts for years and years without having attended school, he has mastered his first lesson in commercial law. He must learn that his daily pursuits are at once hedged in and protected by the ordinary rules in all branches of law, regardless of the artificial compartments made for the convenience of lawyers. If the rule happens to be sanctioned by a penalty, he may find it in criminal law; if by the power of specific enforcement, in equity; if by the assessment of damages, in tort, contract, or property. We must either search the entire field of law and pick out the points that are likely to apply here or there in business life (an impossible task that has already been attempted in several books and courses) or we must anatomize business, as old John Marius would say, and study the legal phases of each of its parts.

The anatomy of business is hardly to be found in the legal digest: we must turn for assistance to the economist and the business expert. Commerce corresponds with the subjects of buying and selling (or exchange), credit and organization, in economic science. The relation of buyer and seller, the relation of debtor and creditor, and the internal relations of a business unit are accordingly three divisions under which business law may be studied.[1] Related to buying and selling in the college of commerce are the following subjects: salesmanship, advertising, commercial geography, investments, perhaps commercial psychology, and the languages, and the

[1] In many schools of commerce the courses are gradually shaping themselves around a business outline not radically different from that here described. In Harvard three courses were given in 1913–14: commercial contracts, law of business associations, and law of banking operations. Mr. Oliphant, of Chicago, plans among others three courses as follows: general course, creditor's rights, employer and employee. The courses in Cincinnati are the three described in the following paragraphs.

study of certain businesses that sell special services, for example, transportation and insurance. In all of these courses the contract is present, either as the object sought or as the beginning of a relation. Contracts form thus the fundamental course in commercial law, and the divisions of contracts deserving particular attention are those dealing with salesmanship, representations, competition. warranties, conditions, fraud and dealers' puffing, and those branches of the law of salesmanship that have to do with the reality of the consent in a contract, and the negotiations and inducements that lead up to it. But the fundamental principles of the law of contracts in all its branches, formation, operation, and discharge are the foundation stones of a course in business law.

Credit is dealt with in the college of commerce in courses on money and banking and credits and collections. The credit man must familiarize himself, not only with the means for testing the safety of risks, but also with the provisions of law that are elements of every risk, that make some risks greater or less under particular facts and that make particular contractual arrangements for the reduction of risks possible. Among these arrangements are liens, mortgages, conditional sales, guaranty, suretyship, indemnity, and the several contracts involved in negotiable instruments.

Organization and administration, finance and accounting, are related to the third branch of business in the college of commerce. In law we may deal with the internal relations of a business under the traditional heads of master and servant, principal and agent, partnership, and corporations.

Most of these subjects have been taught in our law schools for some years. Much can be learned from their experience, but the differences must not be overlooked. Slavish imitations of the law schools may be as foolish in some details as the transfer of a dashboard with a whip-socket to the first automobiles attributed to an absent-minded carriage designer. In the first place our discussion has shown the importance of the co-ordination of law and business study. Besides governing the selection of details as well as the formulation of the general outline of the courses, this principle suggests historical study, the use of cases, and the emphasis of the business rather than the legal problem solved in each case.

A distinguished jurist is said to have set this motto on the title-page of his book: "It is history which teaches us what law is; it is science which teaches us to use it."[1] The development of law can be seen both as a cause and as an effect in relation to the development of business. Sir Frederick Pollock has shown us that "the commonwealth needs elaborate rules about contracts only when it is advanced enough in civilization and trade to have an elaborate system of credit."[2] The same principle applies to details: thus, each of the special contracts to secure the creditor is the outcome of a special need that can be studied with profit by the business student. The evolution of modern business organizations can be traced in the development of master and servant into principal and agent, the creation of the mutual agency or partnership, the various kinds of special partnership including the joint stock company, and finally the corporation or business association with a charter from the state. There are two possible reasons for a rule of law: one is that it is common-sense; the other is that it *was* common-sense. Until the legislature does away with both, we cannot ignore history if we would make the student see the place of law in business. Without this point of view to unify the law of business the principles become mere rules of thumb, easily memorized, more easily forgotten, and most easily misapplied. Without history business jurisprudence is as blind as any other kind.

The rejection of rules of thumb carries with it the rejection of nearly all of the handbooks and textbooks that we have seen in the wake of Parsons. Can case books take their places? The hard-fought battle of the books that raged in the law schools of the last generation need hardly be fought over again by the colleges of commerce. Though but few of these schools have as yet introduced case books, and though the merest beginnings have been made in the production of case books for business students, I am convinced that Langdell and Ames and Keener have not lived in vain. If I marshal the old arguments here, it is only to make sure that there is no fallacy in an analogy drawn in this respect between business

[1] *Report on Legal Education*, 1893, p. 28.

[2] In *Enc. Brit.*, 11th ed., article "Contracts."

man's law and lawyer's law. The arguments of the case advocates were: That cases are sources—*melius est petere fontem quam sequare rivulos;* that cases are the tools that lawyers must learn to use; that cases are concrete and awaken greater interest than do abstract statements. The arguments of the textbook advocates were: That the exclusive use of cases would tend to make case lawyers (men unable to grasp principles and therefore entirely dependent upon precedents); that it would require so much time as unduly to limit the field covered; that it was unwise to expect students to handle cases as intelligently as the experts who wrote the textbooks. Both sides proved too much. Good lawyers have been produced in both types of school, as they have also been produced without the aid of schools. But the event has proved a victory for the case schools because it has disproved the argument of the other side which amounted to a statement that the teaching of law by means of cases alone was practically impossible. Some of the arguments advanced in favor of cases seem at first glance to apply to lawyers only. In one sense it is true that common lawyers have always used cases as the basis of their study of law. But the modern case book, invented by Langdell in 1870, cannot be appreciated unless we look to the parallelism between the methods in the law school and the methods of teaching in other departments of the university. President Eliot has pointed out that the sourcebook in the history department owes its introduction to the success of the case book in the law department.[1] It has been successfully imitated in medicine, philosophy, finance, economics, and social science.[2] It is not unrelated to the development of laboratory method in science. There was a time, not long ago, when chemistry and botany were taught from textbooks and psychology was figured out with one's eyes shut while reclining in an arm chair. Regardless of the particular purpose for which these courses are taught, the modern methods are generally admitted to be better for modern needs. Besides, the student of commercial law, who is also a student of commerce, is entitled to an introduction to the materials of the cases, richer, more abundant, and more accessible, according

[1] Eliot, *University Administration*, pp. 203–5.

[2] Ripley, *Trusts, Pools and Corporations*, Preface.

to Professor Keener, than that of any other department of education.[1]

In these remarks I have avoided reference to *the* case system. The existence of a system of teaching entitled to the name is a modern fiction of the law. Whatever the original plan of Professor Langdell may have been, great diversity has developed in the use of these books, and for that matter, in the books themselves in the hands of different teachers.[2] Professor Thayer has called the case system a system of study consistent with almost any method of teaching.[3] Some teachers stick closely to the recitation of case after case; others use cases simply as a basis for class discussion or as illustrative material for their lectures; some supplement the book by reference to local decisions; others assign collateral reading and require reports either oral or written; others resort to frequent quizzing. To one the case is the unit; to another it is a fascicle of points. In fact, I suspect that one of the elements of strength in the case book is its adaptability to the needs of classes and to the personality and even the idiosyncracies of the teacher. May we not expect various uses of cases in the college of commerce—various case systems?

My own classes have given me an answer. They have deviated from the paths of my professional classes in a manner that convinces me that there are possibilities in the case system that have not yet been explored. They are just as deeply interested in digging

[1] William A. Keener, in a paper read before the Section of Legal Education of the American Bar Association, 1894. Since the writing of this study there has appeared *Bulletin No. Eight* of The Carnegie Foundation for the Advancement of teaching containing Professor Josef Redlich's observations on "The Common Law and the Case Method in American University Law Schools." Many of his striking paragraphs throw light on non-professional law courses, especially those in which he shows that there is a connection between the nature of Anglo-American law and the success of the case method, and those in which he carefully limits the sense in which the case method may be declared "scientific."

[2] It has been remarked that the older case books are generally chronologically arranged; the newer books seem to prefer an arrangement based on a more minute analysis of the subject. Professor Pound, I believe, has suggested that the reason is probably that the older teachers were deeply concerned with historical problems, which are now pretty well worked out.

[3] *Legal Essays*, p. 384, note.

information out of cases and reference books as the professional students—but the information they seek is different. The "moral" of the case is not a law point, but a business point. To illustrate: The law student takes his facts for granted, and centers his attention on what remains to be done. One record of this attitude is found in the examination questions asked in the case law schools. A large percentage of questions end with such words as these: What are the rights of the parties? Can A recover damages from B, and if so, how much? What is the proper remedy? Is this evidence admissible? What should the judgment be? Of what crime, if any, is C guilty? All of these are questions in what I have called legal pathology and therapeutics. The typical question of the commercial student is: But what should A have done in the first place? That is the business man's practical problem. Of course the difference is only one of emphasis, but pedagogy is pretty largely a study of emphasis. From class work and from individual research the business student can discover such points as these: That A in a given case should have demanded a writing; that B should have notified C of his withdrawal from a certain partnership; that D should have had his title examined; that E should not have stood by in silence while F pretended to be his agent; that G should have had his check cashed within a reasonable time; that H should have billed his goods "on sale or return" instead of "on approval"; that J should have looked to his contract to see whether the guaranty covered future transactions; and, most important of all, that K should have consulted a lawyer at a certain pass. The attitude of the business student toward the particular case is likely to reflect the homely philosophy that forbids crying over spilled milk and urges one not to stumble over the same stone twice.

After all, the justification of commercial law in a college of commerce is this: that in the vast network of considerations that hem in a practical decision in business life, some of the most important threads are legal.

NATHAN ISAACS

UNIVERSITY OF CINCINNATI
COLLEGE OF COMMERCE